FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 17 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. [redacted] 39

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY ROBERTS,
Bristol, Virginia,
Counsel for Respondent.

INDEX.

Subject Index.

	Page
The question involved	1
Statement of the case	2
Reasons why petition should be denied	7
Argument on authority	9
Diminishing the record	11

Table of Authorities.

Davis v. *Wakelee*, 156 U. S. 680	10
Grant v. *Buckner*, 172 U. S. 232	10
Grimes v. *Sanders*, 93 U. S. 55	10
Isaacs v. *Hobbs*, 282 U. S. 739	9
Jefferson Standard Life Insurance Co. v. *Wilson*, 260 Fed. 593, 596	9
Litton v. *Pepper*, 100 F. (2d) 830	2
Pepper v. *Dixie Splint Coal Company*, 165 Va. 169, 181 S. E. 406	11
Rankin v. *Cox*, 71 F. (2d) 56	10
Robb v. *Vos*, 155 U. S. 13	10
Smith, Trustee, v. *Litton*, 167 Va. 263, 188 S. E. 214	2

Relevant Statutes.

Bankruptcy Act, Section 70 (E)	10
Virginia Code, Section 6152	3

Index to Important Papers in Record.

Litton's claim for $33,468.89:	
Statement of claim	4-6, 181-184, 254
Litton judgment	181-184
Litton execution and return	254
Litton's plea of *res judicata* in Litton's answer to Pepper's exceptions	6-8

Page

Pepper suit to declare Litton judgment void:
Bill alleging fraud, filed June 13, 1934 210-215
Litton's demurrer and answer 223-224
Order dismissing bill, Feb. 15, 1935 227
Interpleader proceedings by sheriff:
Interpleader petition filed June 15, 1934 237-239
Order of June 15, 1934, convening parties 239-240
Pepper's answer 241-242
Litton's answer 243-245
Order to pay Clinchfield 245
Agreed order to pay balance of fund to trustee 252-253
Pepper motion to quash Litton execution:
Motion filed October 2, 1934 228-230
Litton's plea to motion 230
Referee's proceedings on Pepper petition to refer case to State court:
Pepper petition filed Oct. 15, 1934 9, 271-275
Minutes creditors' meeting Nov. 8, 1934, containing Litton's plea of estoppel against Pepper 19-25
Petition of Hamilton & Heuser to file independent proceeding 25-26
Objections of Litton to said petition 26-28
Referee's order December 18, 1934, directing institution of independent proceeding in State court 189-190
Independent proceeding in State court:
Motion and exhibits 178-190
Litton's plea of estoppel 191-193
Opinion of Circuit Court 149-158
Order of Circuit Court dismissing independent proceeding 351-352
Report of Hamilton & Heuser that validity of Litton judgment had been established 34-35

Smith, Trustee, v. *Litton*, 167 Va. 263, 188 S. E. 214
Litton v. *Pepper*, 100 F. (2d) 890 408-412

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 914

JEAN McNEIL PEPPER,

Petitioner,

vs.

SCOTT LITTON.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent respectfully submits to this Honorable Court the following brief in opposition to the Petition for a writ of certiorari:

The Question Involved.

The controversy is between Litton and Pepper, judgment creditors of Dixie Splint Coal Company, bankrupt.

Pepper filed her petition in the Bankruptcy Court, questioning the validity of the Litton judgment, and asking that the validity of the Litton judgment and executions thereon be referred to the State courts for adjudication. Litton objected, and insisted that the Bankruptcy Court decide the question, but the objection was disregarded, and

by order of the referee the question was referred to the State courts for decision. The State courts held that Pepper was estopped from questioning the validity of the Litton judgment and executions. *Smith, Trustee,* v. *Litton,* 167 Va. 263, 188 S. E. 214.

Thereupon, Litton pleaded the record and decision in *Smith, Trustee,* v. *Litton* in the Supreme Court of Appeals of Virginia as *res judicata* of the question and as an estoppel against Pepper again questioning the validity of the Litton judgment and executions (R. 6-8).

The referee sustained the plea of *res judicata,* the District Court reversed the referee, and the United States Circuit Court of Appeals reversed the District Court, applied the doctrine of *res judicata,* and remanded the case with instructions to give effect to the decision of the State court (R. 408-412). *Litton* v. *Pepper,* 100 F. (2d) 830.

The petition for a writ of certiorari to this Court raises two of the questions presented in the United States Circuit Court of Appeals, viz.: That the jurisdiction of the Bankruptcy Court was exclusive and non-delegable, and the question of fraud.

Statement of the Case.

This statement will be confined to the matters in the record pertinent to the question of *res judicata* without attempting to correctly restate the whole case.

On June 2, 1934, the sheriff of Russell County, Virginia, advertised for sale on June 14, 1934, the property of Dixie Splint Coal Company under an execution on the Litton judgment against Dixie Splint Coal Company, which had been theretofore delivered to the sheriff and levied upon the property (more than four months before bankruptcy). On June 2, 1934, Pepper delivered an execution on her judgment to the sheriff, which was levied upon the same property. The sheriff made the sale on June 14, 1934, and

on June 15, 1934, filed an interpleader proceeding pursuant to *Section 6152 of the Virginia Code*, exhibiting the two executions, stating that both Litton and Pepper claimed the funds by virtue of their respective executions, and that the Clinchfield Coal Corporation claimed $2,153.00 of the fund under a prior lien, and the sheriff paid the proceeds of the sale, $3,200.00, into court (R. 237-239).

On the same day an order was entered (R. 239) convening said parties and requiring them to appear and "*state and litigate their respective claims as touching the said goods and chattels mentioned and described in the petition, and the proceeds of the sale of same, in order to a decision of their respective rights severally touching the same.*" Pepper (R. 241) and Litton (R. 243) answered admitting the priority of the Clinchfield claim of $2,153.00, and Litton claiming the balance of the fund under his execution, and Pepper referring to and relying upon her bill filed in the same court to have the Litton judgment declared void.

On June 13, 1934, Pepper had filed a bill (R. 210) in the Circuit Court of Russell County against Dixie Splint Coal Company, Litton and the sheriff, exhibiting a copy of her judgment, and of the Litton judgment and executions thereon, praying that the sheriff be enjoined from making the sale under the Litton execution on June 14, 1934, and alleging, among other things:

> "3. Dixie Splint Coal Company, Inc., is a 'dummy' corporation, Scott Litton being the real party in interest, and the same person cannot be both plaintiff and defendant, acting in a dual capacity, adverse to the rights of creditors of the Corporation, of whom Complainant was one.
>
> "4. That said supposed confession of judgment was made with intent to hinder, delay or defraud Complainant from what she is lawfully entitled to.

"5. That Dixie Splint Coal Company, Inc. is not indebted to Scott Litton in said sum of $33,568.89, or in any sum.

"6. That said confession of judgment is void so far as the rights of Complainant are concerned, and in fact is void on its face, and as a matter of law."

Litton and the other defendants promptly filed answers denying the allegations of fraud, and other allegations of the bill (R. 219-225).

No further proceedings were had in the case until it was dismissed on motion of Pepper February 15, 1935 (R. 227), which was before the trial in the independent proceedings, which was had on February 21, 1935 (R. 355).

On July 18, 1934, an order was entered (R. 245) in the interpleader case, stating that it appeared from the answers of Litton and Pepper that the Clinchfield Coal Corporation had a prior lien on the funds paid into court by the sheriff for $2,153.00, and it was ordered that said amount of the funds be paid to Clinchfield Coal Corporation, which was done by the clerk on July 18, 1934 (R. 245-47).

On September 7, 1934, Dixie Splint Coal Company was adjudicated a bankrupt (R. 1). On November 1, 1935, an agreed order was entered, signed by counsel for Pepper, in the interpleader proceedings directing that the $961.50 balance of the proceeds of the sale under the Litton judgment and execution be paid to the trustee in bankruptcy (R. 252-53).

On October 15, 1934 (R. 271-75), Pepper filed a petition in the Bankruptcy Court exhibiting her judgment, attacking the validity of the Litton judgment because not properly confessed, referring to her bill in the Russell Circuit Court seeking to set aside the Litton judgment, also referring to

her notice of October 6, 1934, to quash the executions on the Litton judgment (R. 228-232), and stating (R. 274):

> "Petitioner is advised that it is necessary to determine the validity of the alleged judgment in favor of Scott Litton against the Dixie Splint Coal Company for the orderly administration of the estate of the Dixie Splint Coal Company, in bankruptcy; that the validity of said judgment cannot be collaterally attacked but must be attacked directly in the court in which the said judgment was awarded."

And Pepper asked that the referee enter an order directing the trustee to appear in the Russell Circuit Court, and to submit to the jurisdiction of that court the adjudication of the validity of the Litton judgment. The referee entered the order so requested October 17, 1934, without notice. At the request of Litton the order was reheard on November 8, 1934 (R. 19-25). Litton interposed the interpleader proceedings, and Pepper's actions therein, as an estoppel against her right to contest the validity of the Litton judgment and executions, and asked and urged that the referee decide the question.

At that meeting I. M. Quillen resigned as attorney for the trustee, and M. M. Heuser and C. W. Hamilton were appointed attorneys for the trustee, and directed to give the matters involved their prompt attention, and file such petition on behalf of the Trustee as they deemed advisable. On November 27, 1934 (R. 25), Heuser and Hamilton, attorneys, filed a petition or report stating "that it appears that said (Litton) judgment and executions issued thereon, and a sale made thereunder, involve the title to virtually all of the personal estate of the bankrupt as well as the real estate", and asked for permission to institute a new and independent proceeding in Russell Circuit Court to abate and set aside said judgment and all executions thereon.

On December 8, 1934, Litton filed a written answer (R. 26-28) to said petition, setting out the fact that the Pepper bill in chancery and the Pepper motion were already pending in Circuit Court of Russell County, and that one of those suits should be prosecuted rather than put him to the expense of defending another and third suit, and again relied upon his grounds of estoppel and asked that the referee decide the case.

On December 18, 1934 (R. 188-190), the referee entered an order directing Heuser and Hamilton, attorneys for the trustee, to

> *"proceed to institute such suit in the Circuit Court of Russell County, Virginia, in the name of P. H. Smith, Trustee, in Bankruptcy for Dixie Splint Coal Company, Bankrupt, independent and separate from any suit that may now be pending in said court, as they shall deem necessary or advisable for the purpose of testing the validity of the judgment and any and all executions that have heretofore been issued thereon, and for any other purpose which they may deem necessary and advisable."*

Such independent proceeding was promptly instituted, and the record thereof appears in the Virginia record in this case (R. 178). The Circuit Court of Russell County and the Supreme Court of Appeals of Virginia held that Pepper was the only general creditor of the bankrupt, that the trustee represented Pepper in the proceedings, and that Pepper and the trustee were estopped to contest the validity of the Litton judgment by reason of her actions in the interpleader proceedings in the Russell Circuit Court.

On November 23, 1936, (R. 34-35), Hamilton and Heuser filed their report to the referee, stating, among other things:

> "Therefore, we report unto your Court that the validity of the aforesaid judgment in favor of Scott Litton v. Dixie Splint Coal Company, Inc., in the prin-

cipal sum of $33,468.89 has been established by said Scott Litton to have been regularly confessed in so far as this matter is concerned."

On August 23, 1937 (R. 6-8), Litton filed an answer pleading that the question of validity of the Litton judgment and of the executions issued thereon was *res judicata*, and that Pepper was estopped from further contesting the validity thereof. The referee sustained the plea of *res judicata;* the District Judge reversed the referee and remanded the case for further proceedings, at which further proceedings on August 10, 1938 (R. 66), Pepper made a motion for an appraisal of the property which had been sold under the Litton execution on June 14, 1934. Litton interposed the objections of *res judicata* and estoppel, and other objections to said motion; the referee again decided that the questions raised were *res judicata;* the District Court again reversed the referee, and the United States Circuit Court of Appeals reversed the District Court and applied the doctrine of *res judicata*.

Reasons Why the Petition Should Be Denied.

It is submitted that the petition for a writ of certiorari should be denied for the following, among other, reasons:

1. Neither the petition nor the record reveals that the Circuit Court of Appeals has decided any important question of general law in a way probably untenable or in conflict with the weight of authority, nor has it in any way departed from the usual course of judicial proceedings; nor is it shown that the case involves any question of importance which is of public interest; nor that there is any special or important reason which would call for an exercise of this Honorable Court's supervision.

On the other hand, the petition and the record clearly reveal that the only questions here involved are those which

affect private rights of the particular parties here, and nothing more.

2. The decision of the Circuit Court of Appeals is plainly right.

3. The position taken in the petition that the Bankruptcy Court had exclusive, non-delegable jurisdiction of the question is untenable and not supported by authority. If tenable and supported by authority, the petitioner is estopped from raising the question by her action in requesting the Bankruptcy Court to submit the question to the State court for adjudication. It is well established by the decisions of this Court that a court of bankruptcy may consent to another court, having jurisdiction of the subject matter and the parties, to take jurisdiction and adjudicate the case.

4. The revived charge of fraud will not be heard by a court of equity. This charge was made in the bill in chancery in the Circuit Court of Russell County, in June, 1934, and repeated, by reference, in Pepper's answer in the interpleader proceedings a few days later. Instead of pressing and proving the charge of fraud in either or both of those cases, Pepper abandoned the charge, recognized the validity of the sheriff's sale under the Litton execution, agreed that a part of the funds arising from the sale be paid to the Clinchfield Coal Corporation, and the balance paid to the trustee in bankruptcy, and a little later dismissed her bill. After so waiving and abandoning her charge of fraud, Pepper filed her petition in the Bankruptcy Court asking that the question of the validity of the Litton judgment and executions be submitted to the State court for adjudication. The charge of fraud was not made in the independent proceeding which was ordered to be instituted in the State court pursuant to her petition and the further action thereon.

Argument on Authority.

1. The petition states at the middle of page 11:

> "Said Court held that the judgment of the state court, although rendered in a suit upon a different subject matter and for a different purpose, should be accorded binding effect in the bankruptcy court in a contest over the allowability of the claim."

The question submitted to the State court, and the question submitted to the Bankruptcy Court were upon the same subject matter, viz.: The validity of the Litton judgment and executions thereon.

The point is clearly stated and so well supported by authority in the opinion of the Circuit Court of Appeals that further comment or authority is unnecessary.

However, petitioner seeks to avoid the force of the doctrine of *res judicata* by changing her position, set out in her petition in the Bankruptcy Court, that the Circuit Court of Russell County was the only court having jurisdiction of the question, and claimed in the Circuit Court of Appeals and again avers here that the Bankruptcy Court had exclusive, non-delegable jurisdiction of the question.

In *Jefferson Standard Life Insurance Company* v. *Wilson*, 260 Fed. 593, 596, the court said:

> "A party who, for the purpose of maintaining a suit, has deliberately represented a thing in one aspect, cannot be permitted to contradict his own representations by giving the same another aspect in the same case."

This Court in *Isaacs* v. *Hobbs*, 282 U. S. 734, 739 (relied upon in the petition), held that bankruptcy courts have exclusive jurisdiction in such cases *unless the court consents to another court taking jurisdiction.*

In a brief for Pepper in the District Court, it was stated that:

> "The confession of a judgment against itself by a corporation amounts to a conveyance of its assets."

Section 70 (E) of the Bankruptcy Act expressly gives the State courts concurrent jurisdiction with the Bankruptcy Courts of suits to avoid such transfers. *Rankin* v. *Cox*, 71 F. (2d) 56.

In *Grant* v. *Buckner*, 172 U. S. 232, this Court said:

> "The receiver voluntarily went into the State Court, and having voluntarily gone there, cannot question the right of that Court to determine the controversy between himself and the defendant. *A similar proposition was often affirmed in cases of bankruptcy, although by Section 711, Revised Statutes, the Courts of the United States are given exclusive jurisdiction 'of all matters and proceedings in bankruptcy'*". Citing *Mays* v. *Fritton* and *Winchester* v. *Heiskell*, and continuing, "The same rule applies here. The question presented is not how the estate belonging to the receiver shall be administered, *but what is the estate belonging to him.*"

In *Davis* v. *Wakelee*, 156 U. S. 680, this Court held that a party was estopped by a void judgment.

2. The record shows clearly that Pepper abandoned her charge of fraud as soon as it was made in June, 1934, and litigated along other lines for more than three years, then having lost upon the grounds upon which she had elected to litigate, revived the charge, not at the hearing or in any manner before the referee, but on appeal to the District Judge. It is respectfully submitted that by abandoning the charge then she waived any right to revive it now. *Grimes* v. *Sanders*, 93 U. S. 55; *Robb* v. *Vos*, 155 U. S. 13.

It is not deemed proper in this brief to discuss the numerous misleading statements in the petition about fraud, but the statement at the top of page 2 of the petition will be briefly discussed as typical of all such statements.

The case of *Pepper* v. *Dixie Splint Coal Company*, 165 Va. 179, 181 S. E. 406, was decided about a year before that court decided the estoppel case of *Smith, Trustee*, v. *Litton*. The court did base its opinion in part upon claims of fraud against Litton, but when the case was afterwards tried before a Bristol jury, the jury decided that the charges of fraud against Litton were unfounded, as will be seen by their verdict (R. 103-104). The charge related to the item of $114,375 (R. 375), in the Pepper petition relied upon as the basis of the petition for mandamus, which was denied by the Supreme Court of Appeals of Virginia. Pepper filed a bill of review which was denied, and petitioned the Supreme Court of Appeals of Virginia for an appeal from the decree referred to (R. 103-104) which was denied. It can be demonstrated that all charges of fraud against Litton are unfounded. The fact is, and it can be demonstrated from the record, that Pepper was never entitled to recover a dollar from Litton.

Diminishing the Record.

The petition states on page 12 that Litton refused to agree to the diminution of the "Virginia Record". This is the record of the trial of the independent proceeding instituted at the request of Pepper in the Circuit Court of Russell County to test the validity of the Litton judgment and executions. Pepper, by her counsel, directed the preparation of that record for the purpose of the appeal to the Supreme Court of Appeals of Virginia, and apparently thought at that time that all matters incorporated in the record were pertinent. Litton pleaded that record

and the resulting decision as *res judicata* in this case. That record has been under consideration before the referee, the District Court and the Circuit Court of Appeals, and Litton was advised that it was both improper and unwise to diminish it.

It is, therefore, submitted that the petition should be denied by this Honorable Court.

Respectfully,

HENRY ROBERTS,
Counsel for Respondent.

Bristol, Virginia, May 10, 1939.